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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

LOUIS EVANGELISTA, SR. and CLAUDE EVANGELISTA,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can an employer/defendant be convicted of a felony under 26 U.S.C. § 7202 for failure to make timely payment of employment taxes where the defendant fully and truthfully accounts for and reports all taxes that are due to be paid, since the plain language of Section 7202 requires proof of a willful failure to truthfully account *and* willful failure to pay in order to sustain a conviction?

2. Should a criminal tax conviction be sustained where the jury was not specifically instructed as to the components of the defense, including the distinction between deferral and evasion of payment of taxes, good faith belief in the lawfulness of the taxpayer's conduct, and reliance upon the professional advice of an accountant?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Louis Evangelista, Sr. and Claude Evangelista petition for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Second Circuit ("the Court of Appeals") affirming the Judgment of conviction entered in the United States District Court for the Eastern District of New York.

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a) is reported at 122 F.3d 112 (2d Cir. 1997).

JURISDICTION

The Judgment of the Court of Appeals was entered on August 13, 1997. A timely petition for rehearing was filed on August 27, 1997. The petition for rehearing was denied by an order of the Court of Appeals dated September 25, 1997 (Pet. App. 35a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 13 of the Rules of this Court. Jurisdiction of the District Court was based on 18 U.S.C. § 3231.

STATUTORY PROVISIONS INVOLVED

26 U.S.C. § 7202 provides, in pertinent part, as follows:

> "Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

26 U.S.C. § 7201 provides, in pertinent part, as follows:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution."

STATEMENT

This case raises important and unsettled issues involving the proper construction and application of Federal laws providing for criminal punishment in cases involving an employer's failure to make timely payment to the IRS of payroll taxes. The following is a brief summary of the factual background of this case.

1. Petitioner Louis Evangelista, Sr. ("Louis") is businessman engaged in the real estate development and management, construction, and related fields. Petitioner Claude Evangelista ("Claude") is Louis's son and works with his father in these businesses.

2. Petitioners's businesses were initially successful and consistently reported and paid large amounts of income and payroll taxes. However, Petitioners's businesses suffered severe financial reverses in the late 1980's and early 1990's as a result of both the general downturn in the real estate market and a large-scale embezzlement perpetrated by one of Louis's brothers, with the assistance of an employee. Petitioners's businesses thereafter fell behind in the payment of employment taxes, *i.e.*, withholding taxes and FICA contributions. Nevertheless, Petitioners's businesses consistently withheld the required taxes from their employees' gross pay, and truthfully accounted for the withheld taxes by filing accurate quarterly tax returns (Form 941) with the IRS.

3. An indictment was filed against Petitioners (and two other defendants) in the United States District Court for the Eastern District of New York on May 10, 1995. The indictment charged Petitioners with, (1) one count of conspiracy to defraud the United States by impeding the IRS in the collection of income and employment taxes, in violation of 18 U.S.C. § 371; (2) twenty-one counts of willful failure to pay employment taxes, in violation of 26 U.S.C. § 7202; (3) and one count (against Louis only) of willful failure to pay income taxes, in violation of 26 U.S.C. § 7201.

4. Trial commenced on February 1, 1996. Petitioners's principal defense at trial was that they did not intend to evade and defeat the payment of taxes, but rather merely intended to defer payment until such time as the financial condition of their businesses improved. To substantiate this defense, Petitioners pointed to the fact that their businesses consistently filed accurate tax returns reporting the correct amount of the tax liabilities, something they would not have done if their intent had been to evade and defeat—as opposed to merely defer—the payment of the taxes.

5. The District Court held, and charged the jury, that Petitioners could be convicted under 26 U.S.C. § 7202 if they willfully failed to pay the employment taxes, even if their businesses truthfully accounted for the taxes by filing accurate quarterly tax returns.

6. The District Court also refused to instruct the jury as to the components of the defense theory of the case, *i.e.*, (1) that an intent to defer the payment of taxes is not the same as an intent to evade and defeat the payment of taxes, and that defendants could not be convicted of the offenses charged if they merely intended to delay, as opposed to evade, the payment of taxes; (2) that Petitioners could not be convicted of criminal tax offenses if they subjectively believed that it was lawful for them to defer the payment of taxes while carrying on their businesses and paying other expenses; and (3) that Petitioners could not be guilty of criminal tax offenses if they relied on the advice of their accountant that they could continue paying other expenses while deferring payment of the tax liabilities.

7. The jury returned guilty verdicts against Petitioners on all counts on February 28, 1996. On October 28, 1996, the District Court sentenced Louis to a term of fifty-one months' incarceration, to be followed by a three-year term of supervised release, and sentenced Claude to a term of forty-six months' incarceration, to be followed by a three-year term of

supervised release. The Court of Appeals affirmed Petitioners's conviction in a published opinion entered on August 13, 1997.

REASONS FOR GRANTING THE PETITION

This Court should grant the Petition and review this case because, (1) the Court of Appeals interpreted a criminal tax statute, 26 U.S.C. § 7202, in a manner that is inconsistent with the decisions of another Court of Appeals interpreting said statute; (2) the proper interpretation of 26 U.S.C. § 7202 raises an important federal question that this Court has not decided but ought to do so, since Section 7202 defines the potential exposure of employers to criminal punishment in cases involving the failure to make timely payment of employment taxes; (3) the Court of Appeals's affirmance of the District Court's refusal to charge the jury on the components of the defense theory is in conflict with decisions of other Courts of Appeals and of this Court.

I. THIS COURT SHOULD GRANT THE PETITION IN ORDER TO RESOLVE A CONFLICT IN THE CIRCUITS REGARDING THE INTERPRETATION OF 26 U.S.C. § 7202.

One of the two principal contentions raised by Petitioners in the District Court and the Court of Appeals was that there can be no valid conviction under 26 U.S.C. § 7202 where the defendant fully and truthfully accounts for and reports all taxes that are due to be paid. Section 7202 provides as follows:

> "Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony . . ."

The government conceded that Petitioners's companies truthfully accounted for the applicable employment taxes by filing accurate quarterly payroll tax returns. The government's only claim was that Petitioners's companies failed to "pay over" such taxes. However, since the plain language of Section 7202 clearly provides that an offense is only committed if the defendant failed to "truthfully account for *and* pay over" the taxes, it is clear that Petitioners were not properly convicted of violating Section 7202.

Notwithstanding the plain language of the statute, the District Court and the Court of Appeals held that a defendant can be convicted under Section 7202 if the defendant *either* fails to truthfully account for *or* pay over employment taxes. (122 F.3d at 122, Pet. App. 23a). The ruling of the Court below affirming Petitioners's convictions under Section 7202 does violence to the plain language of the statute and is in conflict with decisions of another Court of Appeals on the issue, and should therefore be reviewed and reversed by this Court.

A. The Conflict in the Circuits

The decision of the Court of Appeals in this case is in conflict with the interpretation of Section 7202 adopted by the only other Court of Appeals that has yet addressed the issue. In *United States v. Poll*, 521 F.2d 329, 333 (9th Cir. 1975), the Ninth Circuit followed its earlier decision in *Wilson v. United States*, 250 F.2d 312, 318 (9th Cir. 1957) (interpreting the predecessor statute of Section 7202) and held that in order to make out a violation of Section 7202 "[b]oth the failure to truthfully account for *and* to pay over must be willful." Since the government concededly failed to prove both of these elements as to Petitioners, the Ninth Circuit's construction of Section 7202 compels the conclusion that Petitioners's convictions under that statute are legally untenable.

In affirming Petitioners's convictions, the Court of Appeals expressly rejected the Ninth Circuit's interpretation of Section 7202. (122 F.3d at 121, Pet. App. 22a). Thus, this case

presents a clear-cut conflict in the Circuits regarding the proper construction of Section 7202.

B. The Court of Appeals's Flawed Interpretation Of the Plain Language of Section 7202

In rejecting the Ninth Circuit's interpretation of Section 7202, and instead holding that a defendant can be convicted under Section 7202 based upon the mere failure to pay over the withholding taxes, the Court below relied on a District Court decision, *United States v. Brennick*, 908 F.Supp. 1004 (D.Mass. 1995). The District Court's reasoning in *Brennick*, which the Court below adopted, is unpersuasive, and is based upon a fundamental misinterpretation of the language of Section 7202.

The *Brennick* decision, as well as the decision of the Court below, found it anomalous that Congress would have intended for the statute to penalize one who merely fails to collect trust fund taxes, but not one who fails to pay them over but truthfully accounts for them by filing accurate tax returns. 908 F.Supp. at 1017. However, this interpretation is at odds with the plain language of the statute.

There is a more plausible reading of the disputed phrase in Section 7202, other than the one adopted by the Court of Appeals and *Brennick*, which entirely eliminates the result which the Court of Appeals and *Brennick* found objectionable. The Court of Appeals and *Brennick* parsed the contested phrase in the statute as follows (brackets indicating the separation):

> ". . . willfully fails [to collect] or [truthfully account for and pay over] such tax . . ."

But a different way to bracket the same phrase would be as follows:

> ". . . willfully fails [to collect or truthfully account for] and [pay over] such tax . . ."

This alternative interpretation leads to the creation of the following two offenses:

1) the willful failure to collect and pay over such tax; and

2) the willful failure to truthfully account for and pay over such tax.

This alternative interpretation makes the gravamen of each offense the willful failure to pay, which is not only consistent the primary concern of the tax code, but also makes it clear that such failure to pay will subject an employer to felony prosecution under Section 7202 *only if the failure to pay is accompanied either by the failure to collect or the failure to truthfully account*. Moreover, this interpretation is entirely consistent with the language of the provision, and it is actually a more natural reading than the one followed by the Court of Appeals, because it joins the terms "such tax" and "collection", whereas the sharp disjunctive "or" adopted by the reading of the Court of Appeals and *Brennick* separates "collection" from "such taxes", leading to a very awkward and confusing construction of the statute (*i.e.*, begging the question, collection of what?).

In addition, this reading of the statute is preferable to that adopted by the Court of Appeals and *Brennick* because it links together the acts of "collection" and "accounting for" the payroll taxes, acts which are logically connected under the statutory scheme of the Internal Revenue Code. Under the Code, an employee is relieved of liability for the taxes once the employer has withheld the taxes from the employee's gross pay (*i.e.*, collection), IRC § 31, and the employer notifies the IRS of this assumption of liability by reporting the taxes on quarterly tax returns (*i.e.*, accounting). It makes sense that only an employer who fails to do either of these acts, *and* fails to pay over the taxes to the IRS, should be subject to felony prosecution.

Most important, this interpretation eliminates the consequence that both the Court of Appeals and *Brennick* found unacceptable. The seeming inequity in the treatment of the failure to pay and the failure to collect the taxes disappears. Whether the taxpayer fails to collect, or fails to truthfully account, the taxpayer will be treated the same, depending upon whether the taxpayer willfully failed to pay. Under this reading, one who merely fails to collect will not be treated more harshly than one who collects and truthfully accounts, but does not pay; neither taxpayer will be subject to felony prosecution under Section 7202.

Finally, by converting the conjunctive "and" into the disjunctive "or", the interpretation of Section 7202 by the Court of Appeals and *Brennick* leads to very anomalous results. Thus, under their reading of the statute, an employer who fails to withhold the taxes from the employee's paycheck, but who nevertheless files accurate tax returns and makes full payment of the taxes to the IRS, would still be liable to felony prosecution under Section 7202. Similarly, an employer who withholds the taxes and makes full payment to the IRS, but fails to file a quarterly tax return, would also be subject to felony prosecution. It is inconceivable that Congress could have intended such results.

C. The Court of Appeals's Interpretation is Contrary to The Policies and Legislative History of Section 7202

The foregoing interpretation of Section 7202 is also in harmony with general principles governing criminal tax statutes. As a general rule, the tax code does not subject taxpayers who merely fail to make timely payment of taxes—unaccompanied by other affirmative conduct such as the failure to collect or the failure to truthfully account—to felony treatment. As this Court pointed out in *Spies v. United States*, 317 U.S. 492, 498, 63 S.Ct. 364, 367, 87 L.Ed. 418 (1943), a prosecution for the mere non-payment of taxes where the defendant truthfully

accounted for the tax by filing accurate tax returns is akin to imprisonment for debt, a concept for which the courts have shown a "traditional aversion". It is entirely consistent with that tradition for Congress to have crafted the language of Section 7202 to place mere non-payment cases outside of the realm of felony treatment, and instead to require either the combination of failure of collection *and* failure of payment, or the combination of failure to account *and* failure of payment, for a taxpayer to be liable to felony prosecution under Section 7202.

Notably, there is a misdemeanor provision, 26 U.S.C. § 7215, that does punish the mere failure to pay over payroll taxes. Specifically, Section 7215 makes it a misdemeanor for any person to fail to comply with 26 U.S.C. § 7512, and Section 7512(a)(1) expressly applies to anyone who "fails to collect, truthfully account for, *or* pay over such tax." The language of that statute is clearly and deliberately different from the language of Section 7202; unlike Section 7202, Sections 7215 and 7512 use the disjunctive "or" rather than the conjunctive "and" when referring to the failure to "collect, truthfully account for, or pay over such tax." Unlike Section 7202, the language of Sections 7215 and 7512 clearly defines the failure to collect, the failure to truthfully account for, and the failure to pay over such taxes as *three* separate misdemeanor offenses.

The legislative history of Section 7202 also supports the conclusion that the decision of the Court below is in error, and that the Ninth Circuit's conflicting interpretation of Section 7202 is the correct one. As noted, the Ninth Circuit held in *Wilson v. United States*, 250 F.2d at 318, that the predecessor statute of Section 7202 did not apply to the mere failure to pay over trust fund taxes. The fact that Congress thereafter enacted Section 7202 employing the same language the Court construed in *Wilson* confirms that Congress did not intend for the felony statute, Section 7202, to reach the mere failure to pay over trust fund taxes, where the defendant has

truthfully accounted for such taxes by filing accurate tax returns.

D. The Court of Appeals Failed To Appreciate The Penal Nature of Section 7202

The fundamental error in the interpretation of Section 7202 adopted both by the Court of Appeals and *Brennick* is that those decisions treat Section 7202 as a statute that defines the obligations of a taxpayer. However, Section 7202 is a *penal* statute and its purpose is therefore to define the elements that the government must prove in order to secure a felony conviction, not to impose regulatory requirements upon employers. And, most important, as discussed below, since Section 7202 is a penal statute, any ambiguity in its language must be construed in a manner most favorable to the defendant under traditional principles of the doctrine of lenity.

The fact that there is a defect in the Court of Appeals's reading of Section 7202 can be illustrated by highlighting two contradictory assertions made in the course of a few pages of the Court's opinion. On the one hand, the Court of Appeals (as well as the District Court in *Brennick*) states that "[T]he phrase 'truthfully account for and pay over' is unambiguously conjunctive" (122 F.3d at 121, Pet. App. 21a, quoting *Brennick*). On the other hand, the Court of Appeals states in the conclusion of its opinion that "the Government satisfies the requirements for conviction under 7202 when it proves beyond a reasonable doubt that the defendant willfully failed *either* to 'truthfully account for' *or* to 'pay over' the required trust fund taxes." (122 F.3d at 122, Pet. App. 23a (emphasis in original)). The question is, how did an unambiguous conjunctive, "and", one page later turn into an obvious disjunctive, "either/or"?

The answer is that the Court of Appeals was interpreting Section 7202 from two different perspectives. In the first context, it was interpreting the statute as establishing *what taxpayers are required to do* (account for and pay tax); in the

second context, it was interpreting the phrase in terms of *what the government must prove to establish an offense*. Both the Court below and *Brennick* interpreted Section 7202 as a statute that defines the obligations of taxpayers. That perspective in manifestly incorrect. Section 7202 is a penal statute and it is contained in Chapter 75 of the Internal Revenue Code, entitled "Crimes, Other Offenses, and Forfeitures." Chapter 75—of which Section 7202 is a part—specifies what behavior is criminal under the tax laws. As in any criminal code, it sets out the elements which the government must prove to establish a crime. Section 7202, a penal statute, is not intended to define the obligations of taxpayers; it is intended to define the elements of a criminal offense.

The reading of Section 7202 adopted by the Court below and *Brennick* would make sense only if section 7202 were a statute that establishes what taxpayers are required to do. Both courts read section 7202 this way when they conclude that, "therefore, 'any intentional failure to complete the required task (to truthfully account for and pay over the tax) constitutes a crime.' " (122 F.3d at 121, Pet. App. 21a). However, if section 7202 is read, not as imposing requirements on employers, but as specifying the burden that the government must prove to obtain a felony conviction, then the "unambiguous conjunctive" in the statute must remain a conjunctive, and that means that the burden to prove both elements—the failure to truthfully account *and* the failure to pay—remains on the government.

The interpretation of section 7202 by the Court below and *Brennick* as setting forth the requirements imposed on taxpayers is fundamentally and obviously mistaken, both in terms of the language of the statute and in terms of the structure of Chapter 75 and its place in the overall tax code. Notably, Section 7202 begins, "*Any person required under this title to collect, account for, and pay over any tax imposed by this title* who willfully fails to collect or truthfully account for and pay over such tax . . ." In their interpretations of

Section 7202, neither the Court below nor *Brennick* focused on the highlighted phrase. This introductory phrase refers to the obligations of the taxpayer, obligations that are expressly imposed by *other* provisions of the Internal Revenue Code. It is the *second* phrase, the phrase at issue in this case, that defines what the government must prove in order to secure a conviction. The language of Section 7202 itself recognizes this distinction.

The distinction is further highlighted by the placement of Section 7202 within the Internal Revenue Code. Numerous chapters precede Chapter 75 of the Internal Revenue Code, all of which impose various and extensive requirements on taxpayers. Not all of these requirements have criminal sanctions attached to failures to comply (some have no sanction, others have civil sanctions); and those that do have criminal sanctions vary in nature and severity. Criminal penalties for failures to comply with these requirements (if criminal sanctions are imposed) are defined in Chapter 75, where Section 7202 is found. The key point is that the Court of Appeals was mistaken when it interpreted section 7202 to "require" taxpayers to collect, account for, and pay taxes; Section 7202 defines a criminal offense, it does not "require" taxpayers to do anything. The requirements imposed upon taxpayers are set out elsewhere in the Code, and to be sure, employers are in fact required to do all three acts: collect, account for, and pay over the employment taxes. Section 7202, however, is exclusively limited to identifying which of these three requirements, or which combination of the three requirements, when not complied with, will subject an employer to felony prosecution.

E. The Court of Appeals Erroneously Failed To Consider The Application of the Doctrine of Lenity In Interpreting Section 7202

Since the Court of Appeals and *Brennick* failed to recognize the penal nature of Section 7202, neither decision gave any consideration to the doctrine of lenity in interpreting the

statute. "[L]ongstanding principles of lenity . . . demand resolution of ambiguities in criminal statutes in favor of the defendant." *Hughey v. United States*, 495 U.S. 411, 422, 110 S.Ct. 1979, 1985, 109 L.Ed.2d 408 (1990). When there is more than one possible interpretation, therefore, the interpretation which is less harsh toward the defendant must be selected. Lenity has been a time-honored principle which extends back centuries, originating in England. As Chief Justice Marshall declared: "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself". *United States v. Wiltberger*, 5 Wheat. (18 U.S.) 35, 43, 5 L.Ed. 76 (1820). In a long and unbroken line of precedent, this Court has recognized the validity and application of this principle. *See, e.g., Moskal v. United States*, 498 U.S. 103, 108, 111 S.Ct. 461, 465, 112 L.Ed.2d 449 (1990); *Bifulco v. United States*, 447 U.S. 381, 387, 100 S.Ct. 2247, 2252, 65 L.Ed.2d 205 (1980); *United States v. Bass*, 404 U.S. 336, 347, 92 S.Ct. 515, 522, 30 L.Ed.2d 488 (1971); *Ratzlaf v. United States*, 510 U.S. 135, 114 S.Ct. 655, 662, 126 L.Ed.2d 615 (1994).

Under any view, there can be no question that the doctrine of lenity applies in this case. In its decision, however, the Court of Appeals failed to consider, mention, or refer to the application of this principle. Since Section 7202 is clearly a penal statute, this failure to construe the language of the statute in light of principles of lenity is not permissible.

It was patently inconsistent with principles of lenity for the Court of Appeals to transform the conjunctive "and" into the disjunctive "either/or." Under long-established principles of statutory construction, it was erroneous for the Courts below to construe Section 7202 to reach the conduct alleged here.

In sum, this case squarely presents an important question involving the interpretation of a federal criminal statute as to which the Courts of Appeals have reached conflicting decisions. In view of the continuing public importance of this

question, this Court should grant the Petition and review and reverse the decision of the Court of Appeals.

II. THIS COURT SHOULD GRANT THE PETITION IN ORDER TO RESOLVE A CONFLICT IN THE CIRCUITS RESPECTING THE INSTRUCTIONS REGARDING THE DEFENSES IN THIS CASE.

This Court should also grant the Petition in order to review the decision of the Court of Appeals insofar as it affirmed Petitioners's convictions notwithstanding the District Court's failure to instruct the jury on several critical components of the defense theory of the case. The decision of the Court of Appeals on this point conflicts with the decisions of other Courts of Appeals and of this Court and presents issues of public importance relating to the enforcement of the criminal tax laws.

Petitioners's principal defense at trial was that their intent was to defer the payment of taxes until the financial condition of their businesses improved, not to evade and defeat taxes. Petitioners requested a specific instruction highlighting the distinction between deferral of payment as opposed to evasion of payment, and the District Court declined to give the instruction. The Court of Appeals recognized that Petitioners raised the issue (122 F.3d at 116, Pet. App. 9a), but failed to address it in its opinion.

The law has long recognized the distinction between the evasion of payment of taxes and the failure to pay taxes when due. *Sansone v. United States*, 380 U.S. 343, 85 S.Ct. 1004, 13 L.Ed.2d 882 (1965); *Edwards v. United States*, 375 F.2d 862, 867 (9th Cir. 1967). In *Sansone*, this Court distinguished between the felony of tax evasion set out under 26 U.S.C. § 7201 and the misdemeanor violation of 26 U.S.C. § 7203—which was not charged here—by pointing out that the misdemeanor statute punishes the willful failure to pay a tax "at the time required by law", while the felony statute punishes

the willful attempt to evade and defeat—as opposed to delay—the payment of the tax. 380 U.S. at 351, 85 S.Ct. at 1010. By failing to charge the jury on the point, the District Court took the issue away from the jury and the Court of Appeals's affirmance was inconsistent with the foregoing authority.

The District Court also declined to give specific instructions on Petitioners's defenses that they could not be liable for willful tax violations if they acted under a subjective good faith belief that their conduct was lawful, and in reliance upon the advice of their accountant. The Court of Appeals held that Petitioners were not entitled to specific instructions on these defenses, and that a general charge on the element of "willfulness" sufficed. (122 F.3d at 116-118, Pet. App. 10a).

The decision of the Court of Appeals is inconsistent with decisions of other Courts of Appeals on this point. A defendant's right in a criminal tax case to a proper instruction on the defense of subjective good faith was established by this Court's decision in *Cheek v. United States*, 498 U.S. 192, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991). In conflict with the decision below, the Eleventh Circuit has clearly held that a general instruction on willfulness is not sufficient to present the *Cheek* defense to the jury in a criminal tax case. *United States v. Morris*, 20 F.3d 1111, 1117-1118 (11th Cir. 1994). Similarly, the Sixth Circuit has held that a general willfulness instruction is not sufficient to present the defense of reliance upon the professional advice of an accountant. *United States v. Duncan*, 850 F.2d 1104, 1117-1118 (6th Cir. 1988), *aff'd*, 881 F.2d 1077 (1989), *cert. denied*, 110 S.Ct. 732 (1990).

The fact that the instructions did not adequately convey the theory of the defense is shown by the fact that even the prosecutor was confused about the distinction between evasion and deferral of taxes. At one point in his summation, the prosecutor accused Petitioners of tax evasion by trying to take a "loan" from the IRS. There is a difference between a loan and a theft, and the jury should have been expressly instructed that if all it found was that Petitioners's intent was to *borrow*

the payroll taxes and pay them at a later time, they could not be found guilty of the crimes charged.

In addition to the important issues raised in this case concerning the interpretation of 26 U.S.C. § 7202, this Court should also grant the Petition in order to resolve the foregoing conflicting caselaw addressed to a taxpayer's entitlement to instructions on the theory of defense in a criminal tax case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: December 15, 1997
New York, N.Y.

Respectfully submitted,

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